

Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 3/18/2004)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In re Application of WORLDCOM, INC.  
Pursuant to Public Utilities Code Section 853(b)  
for Exemption from the Requirements of  
Sections 851 and 854 of the Public Utilities Code  
With Respect to its Bankruptcy Reorganizations.

Application 03-08-016  
(Filed August 20, 2003)

**OPINION DENYING COMPENSATION**

This decision denies the request of Greenlining Institute for an award of \$56,278.72 in intervenor compensation in connection with Decision (D.) 03-11-015. Greenlining did not timely file its notice of intent to seek intervenor compensation and did not make a substantial contribution to the Commission's decision.

**Background**

In D.03-11-015, we granted the application of WorldCom, Inc. (WorldCom) for an order pursuant to Pub. Util. Code § 853(b)<sup>1</sup> exempting from prior Commission review and approval under §§ 851 and 854 the restructuring and certain related intra-corporate transactions undertaken to consummate WorldCom's Plan of Reorganization (Plan) under Chapter 11 of the Federal Bankruptcy Code.

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<sup>1</sup> All statutory references are to the Public Utilities Code, unless otherwise noted.

The order was a prerequisite to WorldCom's emergence from bankruptcy, and was the first decision we issued after corporate scandals gripped WorldCom. We recite WorldCom's history of wrongdoing and fraud in D.03-11-015. We nonetheless found that strict scrutiny of WorldCom's bankruptcy Plan was unnecessary because (1) we would retain full jurisdiction over the post-bankruptcy entity; (2) the reorganization did not affect rates or other customer services; and (3) certain corporate reforms to which WorldCom agreed were enforceable in federal court, assuring a level of accountability.

Greenlining filed an "initial response" to WorldCom's application indicating that it was conducting discovery "that [would] enable [WorldCom] to demonstrate . . . how it will become a responsible corporate citizen." Greenlining did not protest the application. Other than noting that Greenlining had filed comments on the draft decision, we did not otherwise mention Greenlining's participation in D.03-11-015, because its work was not germane to our decision. We simply stated that Greenlining had "presented us with no argument against approval of the application," and that "Greenlining supports the draft decision, noting that it has entered into an agreement with WorldCom that 'demonstrates MCI's [the former WorldCom's] intent to be a corporate leader in supplier diversity, workforce diversity, Board of Directors diversity and philanthropy.'"

The proceeding lasted about three months – from August to November 2003. Greenlining's notice of intent to seek compensation (NOI) was due on November 3, 2003 – thirty days after October 2, 2003, when the assigned Administrative Law Judge (ALJ) held the prehearing conference. However, Greenlining did not file its NOI until January 9, 2004, two months after the statutory deadline and after the proceeding was already closed.

**Requirement for Awards of Compensation**

The intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires that the intervenor satisfy all of the following procedures and criteria to obtain a compensation award:

1. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
2. The intervenor must satisfy certain procedural requirements including the filing of a sufficient NOI to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(b)(1).)
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(h), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

Because we deny the request, we will address only two issues: the timeliness of Greenlining’s NOI, and whether Greenlining made a substantial contribution to D.03-11-015.

**Untimely NOI**

Greenlining filed its NOI on January 9, 2004, nearly two months after the decision was final and the due date for the NOI. While Greenlining explains that it did so because the proceeding was expedited, it does not explain why the

expedited schedule prevented it from filing its NOI on November 3, 2003, when the NOI was due. Greenlining asserts that the ALJ's draft decision was issued on that same November 3, 2003 date, but this does not explain why Greenlining could not have made its filing in a timely manner.

In its motion for acceptance of its late-filed notice of intent to file compensation, Greenlining cites to D.03-05-065 as precedent for acceptance of its late-filed NOI. D.03-05-065 described that in Rulemaking 01-10-024, Consumers Union filed its NOI on April 9, 2002 (approximately 2 months after the deadline in that case) with a request for permission to file its notice late due to the change in procedural schedule and broader scope provided by the Assigned Commissioner's April 2, 2002, scoping memo. Rule 76.74(b) of the Commission's Rules of Practice and Procedure provides that the administrative law judge may specify a different procedure for accepting NOIs when new issues have emerged after the time set for filing. Consumers Union's late-filed NOI was accepted by ALJ ruling dated May 28, 2002. Greenlining does not assert that this was the case in this proceeding.

In D.00-03-044, we denied another intervenor – The Utility Reform Network – intervenor compensation because of an untimely NOI. There, as here, the intervenor did not file its NOI until after the proceeding was completed. We stated the following in that decision, and reiterate it here, omitting citations but retaining emphasis in the original:

We reaffirmed the importance of the NOI in D.98-04-059, our Rulemaking examining the intervenor compensation process . . . . We made clear that applicants failing to meet the NOI requirement subsequent to April 23, 1998, when D.98-04-059 was effective, would face an uphill battle in establishing eligibility for compensation.

. . .

While D.98-04-059 did not hold that exceptions to the NOI filing requirement would never be granted, it stressed several benefits of the NOI requirement:

- “The information filed in the [NOI] should provide a basis for a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. . . . The nature and extent of the customer’s planned participation, in combination with the scope of the proceeding as detailed in the scoping memo ruling, should enable the presiding officer to make a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented.”

. . .

- “The statute requires the customer, at the stage where the Notice of Intent is filed, to provide a statement of the nature and extent of the customer’s planned participation. At this stage, the customer has therefore provided the Commission with the issue(s) it intends to address, as best as the customer can at that early stage of the proceeding.”

Moreover, it cannot be ignored that the NOI is a *statutory* requirement. Section 1804(a)(1) provides that “A customer who intends to seek an award under this article *shall*, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation.” (Emphasis added.)

While we have occasionally waived this requirement despite the statute’s mandatory language, we indicated in D.98-04-059 that we would be reluctant to do so in the future.

Furthermore, in the prior cited cases, the NOI was only a few days late, or, in the case of a new intervenor, 55 days late. Those cases cannot be likened to this one, in which TURN filed its NOI nine months after it was due. Moreover, in the SAEJ Ruling, the intervenor was seeking compensation for the first time.

Even if we do have discretion to waive the NOI requirement in some cases, TURN does not invoke that portion of § 1804(a) that grants us such discretion. We may waive the deadline where, within the 30-day NOI filing period, a party cannot reasonably be expected to identify the issues as to which it will participate. However, TURN nowhere asserts that it was unable to identify such issues prior to November 12, 1998, the date on which it concedes its NOI was due. Rather, it bases its motion for late filing solely on attorney inadvertence.

We cannot, on this record, grant TURN's request. We will deny compensation in this proceeding.

We find that the same reasoning supports denying Greenlining's request, as we cannot find that Greenlining's late NOI is excusable. Greenlining is an experienced practitioner before this Commission, not a new intervenor unfamiliar with Commission rules and practices. Even if we were to accept Greenlining's late NOI, however, we would deny its request for compensation because Greenlining did not make a substantial contribution to our decision resolving this proceeding. We discuss below this latter basis for denying Greenlining's request.

### **Substantial Contribution**

Section 1802(h) states that "substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable

costs incurred by the customer in preparing or presenting that contention or recommendation.

Greenlining filed two documents in this proceeding: an initial response (September 12, 2003) and comments on the ALJ Draft Decision (November 7, 2003). The initial response describes Greenlining's interest in protecting the needs of new immigrants, non-English speaking families, minorities, low-income families and low-income senior citizens and lays out additional data that the Commission should consider in evaluating the application. In addition, Greenlining recommended public hearings. No public hearings were held.

Greenlining's comments on the draft decision include an unsigned and undated copy of a partnership agreement between Greenlining and MCI that lays out several commitments that MCI made to Greenlining with respect to diversity and underserved communities in California. As a result, Greenlining supported adoption of the ALJ Draft Decision.

Greenlining gives two reasons in its request for compensation for its assertion that it made a substantial contribution to D.03-11-015. First, it claims that the final Commission decision adopted Greenlining's stated position. The request does not indicate where the Commission cited Greenlining's contribution, quoted Greenlining, or in any way indicated that Greenlining's input had helped satisfy the Commission's concerns. Greenlining takes credit for the Commission's own determination that "it is appropriate to allow a viable competitor in the California long distance market to emerge from bankruptcy proceedings so long as there are mechanisms in place to prevent the recurrence of prior misdeeds." This was an obvious point given WorldCom's history, and would have formed the basis for our decision without Greenlining's input. Thus, we find Greenlining did not make a substantial contribution on this first issue.

Second, Greenlining asserts that it provided much of the evidence on the record demonstrating that granting WorldCom's application was in the public interest. Once again, the decision cites no such input from WorldCom, and indeed, we reached our public interest conclusion without Greenlining's input. The only reference we make to Greenlining's agreement with MCI [WorldCom] regarding underserved communities in D.03-11-015 is in the section entitled "Comments on Draft Decision," where we merely recite, but do not rely on, the Greenlining-MCI [WorldCom] agreement. A review of the record shows that the Greenlining-MCI [WorldCom] agreement was not submitted until after the draft decision was issued, thus, on this point, we also find that Greenlining failed to make a substantial contribution.

In sum, we have examined D.03-11-015 and find no evidence that Greenlining shaped our resolution of this proceeding. D.03-11-015 acknowledges Greenlining's participation, but that in and by itself cannot constitute a "substantial contribution." Stated differently, within the meaning of § 1802(h), Greenlining did not assist us in any of the ways mentioned by the statute (*i.e.*, we did not adopt, in whole or in part, a factual or legal contention or policy or procedural recommendation made by Greenlining). Moreover, within the meaning of § 1802.5, Greenlining did not materially supplement, complement, or contribute to the presentation of another party. Absent a substantial contribution by Greenlining to D.03-11-015, the statute does not allow for an award of compensation for Greenlining's participation.

### **Comments on Draft Decision**

Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment may be waived because this is an intervenor compensation decision.



However, in this case, we allowed comments under the normal 30-day comment period.

Greenlining filed comments on April 6, 2004. Greenlining's comments focus on the elements of their agreement with MCI regarding diversity and underserved communities and argue that these agreements constitute a substantial contribution to D.03-11-015. After reviewing D.03-11-015 and the record and timing of filings made by Greenlining, we cannot agree with Greenlining that the agreement with MCI influenced the outcome of the decision or proceeding. Thus, although we have made changes to the decision to reflect further description and clarification, we do not modify the outcome of the decision.

**Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

**Findings of Fact**

1. Greenlining filed its NOI belatedly and without adequate excuse on January 9, 2004.
2. Greenlining did not make a substantial contribution to D.03-11-015.

**Conclusion of Law**

Greenlining's failures to (1) file a timely NOI, and (2) to make a substantial contribution to D.03-11-015, preclude an award of intervenor compensation to Greenlining for its participation in this proceeding.

**O R D E R**

**IT IS ORDERED** that:

1. The Motion to accept Late-Filed Notice of Intent to Seek Intervenor Compensation of Greenlining Institute, and the accompanying Request for Intervenor Compensation, are both denied.

2. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**Compensation Decision Summary Information**

<b>Compensation Decision(s):</b>	
<b>Contribution Decision(s):</b>	D0311015
<b>Proceeding(s):</b>	A0308016
<b>Author:</b>	ALJ Thomas
<b>Payer(s):</b>	

**Intervenor Information**

<b>Intervenor</b>	<b>Claim Date</b>	<b>Amount Requested</b>	<b>Amount Awarded</b>	<b>Reason Change/Disallowance</b>
Greenlining Institute	January 9, 2004	\$56,278.72	\$0	Failure to make substantial contribution, failure to file timely NOI

**Advocate Information**

<b>First Name</b>	<b>Last Name</b>	<b>Type</b>	<b>Intervenor</b>	<b>Hourly Fee Requested</b>	<b>Year Hourly Fee Requested</b>	<b>Hourly Fee Adopted</b>
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